Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

EDWARD WESLEY WALTON, PETITIONER

VS.

BARBARA THROGMORTON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO

STATE OF ILLINOIS APPELLATE COURT

FIFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

EDWARD WESLEY WALTON

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45 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can a state court against plaintiff's will set trial and subpoena the plaintiff, who is residing out of state, and then at trial on plaintiff's non-appearance denying his motion to supply evidence dismiss his cause with prejudice?

2. Does the judgment thus obtained contravene due process of law as laid down in Amendment XIV to the Federal Constitution, Section 1?

3. Should the United States Supreme Court, either by case decision or rule amendment, clarify that the mandatory nature of U. S. Supreme Court Rule 4(a) is a question entirely distinct from its jurisdictional nature?

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 2

STATEMENT OF THE CASE. 3

REASONS FOR GRANTING THE WRIT. 5

CONCLUSION. 13

INDEX OF APPENDICES

APPENDIX A
2nd Decision
State Court of Appeals. A1

APPENDIX B
2nd Decision
State Trial Court B1

APPENDIX C
Decision of State Supreme Court . . . C1

APPENDIX D
1st Decision
State Court of Appeals. D1

APPENDIX E
Maps and Table. E1

TABLE OF AUTHORITES CITED

No cases or statutes are cited. The presentation is based on reasoning and principles. Citations are in the record to June 28, 1995 (Briefs on the Merits).

CASES

STATUTES AND RULES

OTHER

Federal Election Commission MUR 4411

Mark A. Hall, The Jurisdictional Nature of the Time to Appeal, 21 Ga. L. Rev. 399-427 (1986)

David Simmons, 36 ABAJ 711.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix D and is reported at

653 N.E.2d 803

Ill. App. 5 Dist. 1995

JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 1995 (App. A). The State Supreme Court denied discretionary review on June 5, 1996 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. 1251.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Statutory Authority:

U.S. Const. amend. XIV, Sec. 1.

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

...[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Defense Counsel James Karraker drafted the will. Except for half an acre the will leaves all of the 380 acre Walton family farm to Plaintiff Edward Walton's sister. Walton filed a Petition to Set Aside the Will. The petition which sought an equal division of the estate was vigorously contested by Karraker and Throgmorton. Defense called Walton from out of state to give deposition. Walton stayed for four weeks to research courthouse records in Illinois and then returned to Massachusetts. The farm is in Anna, Illinois [App. E2, Township 16].

Plaintiff Mr. Walton is a classics professor who has taught in different states in connection with his profession as an educator. Walton was born in the farmhouse and farmed with his father before taking up a teaching career. He helped his father to build the ponds on the farm. Mr. Walton's father died while Mr. Walton was teaching at Converse College in South Carolina. Walton's Mother Rosemary inherited the farm. Her name is inscribed on the farm property map [County Map, Anna, Illinois, App. E2, Township 16].

Circuit Court at a hearing in March, 1994, dismissed Walton's case with prejudice. Walton taking up his cause pro se appealed to the State Appellate Court. Court found abuse of discretion, reversed the case and remanded it to the Circuit Court.

Circuit Court set trial of the case

under the same judge and as before issued a subpoena, then again as before dismissed with prejudice. The State Court of Appeals has well shown in like circumstances that such actions are errant [App. D9, D10]. Circuit Court did not issue an order. Mr. Walton telephoned the Circuit Court. The information received was ambiguous.

Twenty-eight days after the trial Walton posted to the Appeals Court a letter "in the nature of an appeal." Walton paid the appellate fees to both courts. Although both parties in the cause overlooked the error, the Appeals Court on its own motion finding a timing defect, which it felt compelled to characterize as jurisdictional, barred the appeal [App. A1-A2]. Errors in the Circuit Court cannot be properly reviewed, if the Appeal Court divests itself of jurisdiction.

REASONS FOR GRANTING THE WRIT

By statute of congress the Supreme Court may, with some exceptions, review only final judgments of state courts. The Supreme Court's review of state court decisions is limited to issues of federal law. Two federal issues in this case figure very prominently. Subpoenas issued beyond state boundaries, if they are used abusively, contradict due process on the federal level. A second federal issue concerns jurisdiction. The relevant questions of jurisdiction have been treated exhaustively, with clarity, by Professor Mark Hall [The Jurisdictional Nature of the Time to Appeal, 21 Ga. L. Rev. 399-427 (1986)]. Yet it is the trial court's final judgment [App. B] that we must consider here.

In the realm of human rights freedom from arbitrary, unlawful interference with life, with liberty, and with property is the fundamental claim since time immemorial. From the Decalogue of Moses to the English Magna Carta, and to the American Federal Constitution, it is the original foundation of all of our law. And yet the abstract right must come down always to historical particulars.

In England on June 15, 1215, at Runnymede on the River Thames the barons prepared a charter for King John to sign, the Magna Carta. The heart of this charter was Chapter 29, which read as follows:

> No freeman shall be taken or imprisoned or disseized of his

> freehold or liberties or free *customs, or outlawed, or exiled,* or in any way destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers, or by the law of the land.

David Simmons noted (36 ABAJ 711) that King John's disregard for the right of his people to be let alone proved to be "so outrageous that [since then] no English King has dared to take the name of John." The key idea in Chapter 29 of the Great Charter is arbitrary influence. To disestablish is to destroy. Though one may state about disinheritance, that no vested interest is lost, we refer again to the same passage as construed by the English Parliament (A.D. 1354).

The act of Parliament reconfirming the Magna Carta paraphrased Chapter 29 as follows, stating:

> That no man . . . shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due Process of Law."

To be brought in answer means to be summoned, as to trial. By due Process of Law means by proper legal process. This is the first reference in English law to due process. Disseized means disinherited. Disinheritance is the exclusion of an heir from his right to succeed to the estate or property of his ancestor. The fundamental right of succession is so regular and expected that deprivation of it is almost to

deprive a citizen of his chartered *rights and immunities*.

Property is placed by the Constitution in the same category with liberty and life. John Locke, On Government, II, Section 190, delineates two great principles:

> Every Man is born with a double Right: First, a Right of Freedom to his Person, which no other Man has a Power over, but the free Disposal of it lies in himself. Secondly, A Right, before any other Man, to inherit, with his Brethren, his Father's Goods [the ancestral property].

"Man" in the original generic sense means "Human Being."

Locke's first principle upholds personal liberty. It is a liberal principle. It entails freedom from arbitrary process. We shall not send upon a fellow citizen by legal procedure merely. John Locke's second principle is conservative. It enjoins continuity and stability in the community.

In Section 27 (II) Locke also states:

> [E]very Man has a property in his own Person. This nobody has any Right to but himself. The labour of his Body, and the Work of his Hands, we may say, are properly his."

So Locke's first principle, of personal

liberty, embodies equity, just as it also forbids the arbitrary subpoena.

If it is to be objected that principles of human rights set forth in the Magna Carta, confirmed by the English Parliament, elucidated by John Locke, and adopted by the American Federal Constitution, are too broad to be applied here, in this instance, yet where are these principles better tested, and from where else may they draw their life, or find a secure application, if not here and if not now? For indeed, the case at bar precisely illustrates these fundamental principles of law just described. That is why this Court should consider it. Treating a procedural timing defect as innately mandatory unjustly precludes appeal.

In the present case, subject matter of the cause is disinheritance of a son. Plaintiff's sister Mrs. Throgmorton took up residence in the farmhouse with their mother and converted her to an evangelistic doctrine. Throgmorton also by legal procedures aided by Mr. Karraker converted the local Anna Presbyterian church which our mother attended to the same religion, altering the church's name. Mr. Walton in regard to the church activity, which he believes is political, has lodged a complaint that is under review with the Federal Election Commission, No. 4411. This is of national importance because it fundamentally affects our rights under the Constitution. In specific effect, it works substantial prejudice against the plaintiff, taking away home and the farm. The church affected is the family church.

As to the Circuit Court, It is axiomatic that a court lacking jurisdiction over the person of a litigant is not able to render a personal judgment against him. In this case the Plaintiff Mr. Walton was treated by the Court as though a Defendant, over whom the Court had personal jurisdiction. May the Court well know, Mr. Walton in a motion before trial attempted to supply evidence to the Circuit Court which motion was denied [App. B1, Court Docket Notes]. The matter is evidence of a misstatement of fact in answer to an Interrogatory (Number 22). A "Yes" answer, the proper answer, indicates Barbara Throgmorton and James L. Karraker had worked together prior to the date of the will. Walton has maintained that Mr. Karraker is not his mother's lawyer, but his sister's. The connection between them relates to the FEC Case (MUR 4411).

What principle of law might one deduce from the final judgment decision of the Union County Trial Court, October 6, 1995, that could possibly sustain validity in any other court of law? If this decision had been made by a higher court, what precedential value would it have? One should hope none at all. Under the doctrine of stare decisis, such a dangerous precedent would encourage in county courts the spontaneously arranged trials of litigants, in absentia, with the courts summoning from out of state or maybe out of the country a party to their proceedings, plaintiff or defendant, and then settling that person's case in his

absence.

Extremist movements can be very forceful. Plaintiff's research has found somewhat comparable incidents of intense political activity.

Last year in Washington State the Democratic incumbent candidate was not returned to office in his November campaign for reelection as county Sheriff, when his [Christian] Patriot connections became known to the local voters [Robert Crawford and Devin Burghart, "Patriot Sheriff Loses Race," The Dignity Report: In Defense of Democracy and Civil Rights (Fall, 1995)].

According to Crawford and Burghart, a local group designating themselves as Christian Patriots are actively linked to another local group called Posse Comitatus. Sheriff P. Murphy's campaign literature "emphasized themes clearly designed to appeal to Christian Patriots and militia supporters, including ideas prominent in Posse Comitatus circles." The authors [p. 7] observe that a

> tendency to aggrandize county-level government in general, and the office of sheriff in particular, has been a central position in Patriot thinking since the 1970s. The idea of county supremacy was central to posse comitatus advocates who maintained that the county sheriff held the highest legitimate authority--at least as long as he supported the Christian Patriot causes and refrained from "treason."

In Washington State a militia

promoter, Mr. Jack McLamb, has sought to establish his American Citizens and Lawmen Association (ACLA) as a central clearinghouse to organize militia. McLamb's associate, Richard "Rick" Dalton, as he endorsed Sheriff Murphy's campaign, stated:

> Sheriff Murphy has set up plans to have us come and present our Constitutional study course, the fundamental principles of the Constitution of the United States, to all of his employees in the Sheriff's Department.

In the Patriot coded language this reference to the fundamental principles of the Constitution means [p. 6] "rescinding or ignoring Amendments after the first ten, including especially the Fourteenth..." which the authors find as a prospect "particularly troubling." This indicates a potential for contumacious disregard of the due process clause of the Fourteenth Amendment. In similar manner, the Circuit Court action audaciously contravenes Fourteenth Amendment legal due process, as aptly demonstrated by the June 28, 1995, mandate of the State Court of Appeals [App. D].

The Constitution is fundamental law. The practical effect of a decision that errantly proceeds to trial and then at trial precludes submission of evidence, and moreover, treats the case as adjudicated on its merits, disposing of it with prejudice, is to violently impugn due process and so doing to oppugn the Constitution. It is extravagant and deserves review.

We must be vigilant against all extremist or nativist trends, overt or covert, at any level in the federal system, that potentiate discord within and between the states. Such discord, when it attacks Constitutional rights, poses a serious threat to federal-state comity. Supreme Court review of Walton vs. Throgmorton can affirm the authority of the State Appellate Court, as it relates to the law of this case. Therefore, the petition should be granted.

Walton vs, Throgmorton needs to be given a different venue which should be at the nearby Jackson County Court in Marion, Illinois. A Letter to the Editor (Rene Mandel, Boston Globe, April 25, 1994) states:

> After three years of dealing with advocates of these [religious right] groups, I am firmly convinced that the issues have little to do with religion and everything to do with ... the desire of certain groups and individuals to seize power and shape government to their own ends, even if it means subverting the democratic process. ... [These groups sponsor] individuals who ... force communities to contend with all the emotional and financial burden associated with grandstanding politicians and lawsuit-provoking actions. I view this as a most pressing danger to democracy.

CONCLUSION

This is about a heartland farm. There are many such farms. But the fundamental legal principles involved apply pervasively. The petition for a writ of certiorari should be granted.

Respectfully submitted.

Edward Wesley Walton

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APPENDIX A

Illinois State Court of Appeals
Fifth District

Walton vs. Throgmorton
No. 5-95-0820

December 6, 1995

O R D E R

This cause has been considered on plaintiff-appellant's response to rule to show cause and motion for leave to supplement response; and the court, being advised in the premises, finds:

That plaintiff-appellant wrote to this court to provide notice that he intends to appeal any "appealable decree or order that may have been issued on or about October 6, 1995." The letter, which was received and filed in this court on November 6, 1995, was treated as being in the nature of a notice of appeal. An order was entered on the court's own motion on November 15, 1995, directing plaintiff-appellant to show cause why his appeal should not be dismissed for lack of jurisdiction where the document purporting to vest the court with jurisdiction does not on its face comply with the jurisdictional requirements of Supreme Court Rule 303(a);

That plaintiff-appellant has responded to the rule to show cause by providing this court with copies of letters written to the circuit clerk of Union County. One letter dated November 25, 1995, reiterates a prior demand that the circuit clerk forward to him the transcripts of the trial court proceedings that took place on October 6, 1995. The other letter dated November 27, 1995, advises the clerk of plaintiff-appellant's belief that his letter received by this court on November 6, 1995, vests this court with jurisdiction over his appeal. The supplement to the response includes a copy of plaintiff-appellant's letter purporting to be a notice of appeal as

well as his November 27, 1995, letter to the circuit clerk. Also contained in the supplement are certain postal receipts of documents mailed by plaintiff-appellant;

That plaintiff-appellant fails to show in either his response or supplement thereto that he has indeed filed a timely notice of appeal with the circuit clerk of Union County in the manner prescribed by Supreme Court Rule 303(a);

That the only jurisdictional step in the perfection of an appeal is the timely filing of a notice of appeal. (Bean v. Norfolk & Western Railway Co. (1980), 84 Ill. App. 3d 395, 405 N.E.2d 418.) The letter received by this court on November 4 [November 6], 1995, does not satisfy the jurisdictional requirements of a notice of appeal as set forth in Supreme Court Rule 303(a) because it was not filed with the circuit clerk. Plaintiff-appellant has made no showing that he has taken that necessary jurisdictional step in the perfection of an appeal; therefore, the appeal must be dismissed.

IT IS THEREFORE ORDERED that plaintiff-appellant's motion to supplement response to rule to show cause shall be, and the same hereby is, GRANTED. IT IS FURTHER ORDERED that the appeal of this cause shall be, and the same hereby is, DISMISSED for lack of jurisdiction for the reasons set forth in the rule to show cause.

APPENDIX B

Decision of Illinois State Trial Court
Union County Circuit Court

Walton vs. Throgmorton
No. 92-CH-15

October 6, 1995

ENTRY OF JUDGMENT

Trial Docket Notations

Case No. 92-CH-15

Edward Wesley Walton
v.
Barbara Throgmorton

James L. Karraker

DATE	JUDGE AND REPORTER
[Clerk's Entries]	
9 21 95	Clerk mails Notice of Bench [T]rial set for October 6 1995 c 9:00 A.M.
9 22 95	Proof of Service Filed.
9 25 95	NOTICE COMPELLING APPEARANCE WITH PROOF OF SERVICE FILED.
[Judge's Entries]	
10 6 95	Clarke/A.B. Plaintiff FTA. Resp present w/atty. Motion to Dismiss pursuant to SCt Rule 237 Granted. Motion for Leave to Supplement the Record is denied.

10 11 95 Clarke. Court receives correspondence from Plaintiff. Court notes correspondence dated 10/3, mailed "2 day" delivery 10/5, post office attempted delivery 10-7 (Saturday), received 10-10, letter opened today 10-11 & ordered filed despite no proof of service. [Ordered] Clerk send atty copy of correspondence.

[Clerk's Entry]

10 11 95 Clerk Mails Attorney Karraker Copy of Correspondence Filed October 11, 1995.

APPENDIX C

Illinois State Supreme Court

Walton vs. Throgmorton
No. 80618

June 5, 1996

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

June 5, 1996

Mr. Edward W. Walton

No. 80618

Edward Wesley Walton, petitioner,
v.
Barbara Throgmorton, respondent.

Leave to Appeal,
Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1996.

[May the Court please note: Walton has not received a copy of any Order issued by the Illinois Supreme Court, other than the above-quoted letter.]

APPENDIX D

Decision
Illinois State Court of Appeals
Fifth Judicial District

Walton vs. Throgmorton
No. 5-94-0307

June 28, 1995

O R D E R

FILED
JUN 28 1995

NO. 5-94-0307

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

JUSTICE HOPKINS delivered the opinion of the court:

Plaintiff, Edward W. Walton, appeals from the dismissal with prejudice of his petition to set aside the will of his mother, Rosemary G. Walton.

Walton filed a timely petition to set aside his mother's will, claiming that his sister, the defendant and executor of that will, had unduly influenced their mother in the preparation of her will. Defendant filed a motion to dismiss alleging that the petition to set aside the will was defective. The motion to dismiss was denied on February 23, 1993, after Walton amended his petition with leave of court. In May 1993 this cause was set for bench trial September 3, 1993, but was continued on the court's motion and reset for November 5, 1993. Twenty-one days prior to the November 5, 1993, trial, Walton's first attorney of record, Sheila Simon, was allowed to withdraw. The case was reset to February 3, 1994, on a motion by Simon. At a status hearing on December 3, 1993, Walton's second attorney, James Hopkins, entered his appearance. On January 31, 1994, Hopkins was allowed to withdraw as

Walton's counsel, but the trial court refused at this time to continue the bench trial that was set for February 3, 1994. Walton objected to that refusal in a letter to the court, claiming a violation of Supreme Court Rule 13(c). 134 Ill. 2d R. 13(c).

On February 3, 1994, the date of the trial, Walton's third counsel of record, Patrick Hewson, entered his appearance and requested a continuance, citing inadequate time to prepare. The continuance was granted over defendant's objection. The court ordered Walton to pay the costs of trial preparation through January 31, 1994. Also at this hearing, the court ordered all discovery completed by February 23, 1994, and then reset the trial to March 24, 1994.

Hewson moved to withdraw on February 22, 1994. This was Walton's third attorney to move to withdraw within a period of four months and 10 days. Walton had been represented by counsel at all the hearings and on all trial dates, although he had never personally appeared in court. On February 23, 1994, the date by which discovery was to be completed, defendant served Walton with a notice to appear, pursuant to Supreme Court Rule 237 (134 Ill. 2d R. 237), compelling Walton:

> "to appear before the Circuit Court of Union County on February 25, 1994, at 10:00 a.m., and to produce the following documents:
>
> 1. Evidence of attorney's fees paid to all prior counsel, including but not limited to Sheila Simon, James Hopkins,

McMeen, and Patrick Hewson."

At the February 25, 1994, hearing on Hewson's motion to withdraw, Walton did not appear and discovery remained incomplete, in that depositions of the defendant and defense counsel's secretary had not been taken. During the withdrawal hearing, Hewson advised the court that he was not given authority to conduct discovery or otherwise engage in any activity beyond securing the continuance granted on February, 1994.

[Note: All following brackets and parentheses and bracketed interjections and parenthetical comments such as "emphasis added" and any asterisks or other indications of ellipsis are the Appellate Court's.]

There is no transcript of any proceedings of record except the February 25, 1994, hearing on Hewson's motion to withdraw. During this hearing, the court dismissed Walton's cause of action, stating:

> "THE COURT: I am more concerned about the discovery deadline that I set for February 23rd which was an integral part of the continuance ***. I want there to be no question when and if this matter is reviewed as to the context of the decision to allow the Motion to Continue at that time. I specifically found at that time that the Motion to Continue should be granted; not because of any violation of discovery rules by the other side, but simply to insure that there

would be one last change [sic] for a hearing on this matter on the merits, and to assess costs to be paid by the Plaintiff, because I did not think that there was any good reason for the matter to be continued at that time other than one last chance to try to get this matter heard on the merits. And I specifically ruled at that time that discovery was ordered to be completed by February 23rd. Now, what I am hearing today is that discovery is not completed. Is that fair?

MR. HEWSON: That is correct, Your Honor.

THE COURT: And the reason that the discovery has not been completed is because in your client's opinion you were retained solely to obtain a continuance as opposed to any other function in this case. Is that correct?

MR. HEWSON: That is essentialy correct, Your Honor.

THE COURT: During your entire representation of your client he has said that you, quote, have no authority to conduct discovery or otherwise engage in any activity beyond the continuance, close quote, as cited in his Consent to Withdraw?

MR. HEWSON: That is, I think, in essence correct? [sic]

***

THE COURT: Mr. Hewson, I am going to grant your motion to withdraw, sir. You are out of this case as attorney for Mr. Walton, and in fact, you may leave if you

wish.

MR. HEWSON: I don't know if the Court would like me ... I feel I have to under Supreme Court Rule ... notice of the ...

THE COURT: Do whatever you think appropriate, sir.

MR. HEWSON: Thank you, Your Honor.

THE COURT: Mr. Karraker [defense attorney], are you wishing to preserve your rights to sanctions for failing to comply with discovery?

MR. KARRAKER: Yes, Your Honor, I am.

THE COURT: I am dismissing this case, and I am making several findings. First of all, the initial Motion to Dismiss that was filed by Mr. Karraker, was heard by me, and to say I gave the gray area to Mr. Walton would be an understatement, because I have a great desire, like all Judges and like most people, to have cases heard on the merits as opposed to any technical defect with respect to where a case is filed or the allegations within the case; but it is clear to me that this is a vexatious frivolous action that is being pursued without any desire to get to the merits on the part of Mr. Walton. So, for many reasons; one, the Plaintiff or Mr. Karraker is requesting as a discovery sanction ... *** As a sanction for failure to comply with discovery action the Court ... or discovery orders ... the Court finds ample grounds for

> dismissal as a discovery sanction. Secondly, because these actions are bound by the Rules of Civil Procedure the Court finds ample grounds to dismiss for want of prosecution on the part of Mr. Walton. The Court finds that Mr. Walton's actions with respect to the Motion to Continue, which was granted by the Court on February 3rd, 1994, amounts to a complete misrepresentation of fact to the Court, which could in and of itself arise to contempt of Court, for the reason that an attorney appeared in this action ostensively [sic] to take on duties and comply with discovery and had that purpose thwarted by Mr. Walton himself, who refuses to cooperate with discovery and, in effect, misrepresented a willingness to comply with the Court's orders on February 3rd, which were an integral part of the Motion to Continue being granted."

It is evident from the transcript that the trial judge's intent was to dismiss for reasons of discovery sanctions even though the order also characterized this cause as a "vexatious frivolous action" and stated that there were "ample grounds to dismiss this case for want of prosecution on the part of the Plaintiff."

A trial court should dismiss an action only if it is apparent that no set of facts can be proven that will allow plaintiff to recover. (Munizza v.

City of Chicago (1991), 222 Ill. App. 3d 50, 52, 583 N.E.2d 561, 563.) A reviewing court must determine whether the allegations in the complaint, when read most favorably to the plaintiff, are sufficient to set forth a cause of action upon which relief may be granted. (Munizza, 222 Ill. App. 3d at 52, 583 N.E.2d at 563.) This reviewing court does not have the benefit of the transcripts from the motion to dismiss hearing held February 23, 1993, but the record is clear that the trial court denied defendant's motion to dismiss. Furthermore, there is no evidence of record and no claim made that Walton or any of his attorneys signed any pleading for any improper purpose. (134 Ill. 2d R. 137.) Therefore, the trial court had no basis from which to determine that this was a vexatious or frivolous action.

Section 13-217 of the Code of Civil Procedure permits a case to be dismissed for want of prosecution but does not allow a dismissal for want of prosecution to be with prejudice. "In the actions specified in *** this Act *** where the time for commencing an action is limited, if *** the action is dismissed for want of prosecution, *** then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff *** may commence a new action within one year or within the remaining period of limitation, whichever is greater, after *** the action is dismissed for want of prosecution." 735 ILCS 5/13-217 (West 1992).

> "[A] dismissal for want of prosecution does not prejudice

> plaintiff's case nor bar a subsequent suit on the same issues. [Citation] Since a dismissal with prejudice denotes an adjudication on the merits and is res judicata, a dismissal for want of prosecution, by its nature, is without prejudice. [Citations] Therefore, a trial judge does not have the authority to dismiss a case for want of prosecution with prejudice because, if he had that power, a right specifically conferred [by section 13-217] would be defeated. [Citation.]

Supreme Court Rule 219(c)(v) (134 Ill. 2d R. 219 (c)(v)), however, gives the trial judge the power to dismiss an action with prejudice for refusal to comply with rules or orders relating to pretrial discovery or pretrial conferences. (134 Ill. 2d Rules 201-218.) (Emphasis in original.) Farrar v. Jacobazzi (1993), 245 Ill. App. 3d 26, 32, 614 N.E.2d 259, 263.

The record reflects that the trial court dismissed this case as a discovery sanction against Walton. The trial judge stated that there were ample grounds for dismissal as a discovery sanction, although defendant did not argue for discovery sanctions and made no motion to preserve discovery sanctions. Instead, defendant only responded affirmatively when the court asked if he wished to preserve the right to sanctions for failure to comply with discovery. We find no specific instance of discovery abuse that merits dismissal as a discovery sanction against Walton.

To dismiss a cause of action as a discovery sanction, the trial court must indicate, with some specificity, grounds to support its actions. (Martinez v. Pfizer Laboratories Division (1991), 216 Ill. App. 3d 360, 576 N.E.2d 311.) We can find nothing in the record to support the trial court's indication that discovery was thwarted by Walton. The single reference to discovery uncompleted prior to the February 23, 1994, deadline was the reference to depositions of the defendant and defense counsel's secretary. These depositions were requested by Walton, and we see no prejudice against defendant by these depositions not being taken. Therefore, the failure to complete discovery is not proper grounds for dismissal.

We do acknowledge Walton's failure to appear at the withdrawal hearing on February 25, 1994, but a dismissal based on his failure to appear at that time is not proper. The sole purpose for the February 25th hearing was to consider Hewson's motion to withdraw. That motion was granted a full month prior to the trial date of March 25, 1994. It was inappropriate to require Walton to appear at the February 25, 1994, hearing under Supreme Court Rule 237(b).

> "The appearance at the trial of a party *** may be required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at the trial of documents or tangible things. If the party is a nonresident of the county, the court may order any terms and

> conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate." (Emphasis added.) 134 Ill. 2d R. 237(b).

In the case at bar, Walton had not failed to comply with a proper Rule 237(b) notice, since it did not compel Walton's appearance for the date of the previously scheduled trial. Thus, there is no basis for a dismissal as a Rule 219(c) sanction. Dismissal might have been an appropriate sanction against Walton if a properly dated notice to appear at trial had been issued and Walton had not appeared, but this is not the case. The trial court errantly dismissed the case before giving Walton an opportunity to appear and prove his case on the date of the trial.

Additionally, there is nothing in the record to indicate that the court notified Walton at any prior hearing that such a strong sanction would be imposed by his failure to appear. Dismissal with prejudice for abuse of the discovery process is the most severe sanction available to the court and is to be employed only as a last resort, and only in those cases where the actions of a party show a deliberate, contumacious, or unwarranted disregard of the court's authority. (See Heuer Sons Implement Co. v. Dukes (1989), 183 Ill. App. 3d 56, 58, 538 N.E.2d 1180,

1181.) The facts in this record show a disregard for the court's authority, but without some notice to Walton that a dismissal was imminent, we cannot find that the dismissal was used only as a last resort.

"Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation. Discovery for all parties will not be effective unless trial courts do not countenance, and unhesitantly impose sanctions proportionate to the circumstances." (Buehler v. Whalen (1977), 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467.) "[T]he purpose of sanctions under Supreme Court Rule 219(c) is to obtain compliance with discovery rules, rather than to dispose of litigation as a form of punishment." (United Excavating & Wrecking, Inc. v. J. L. Wroan & Sons, Inc. (1976), 43 Ill. App. 3d 101, 105, 356 N.E.2d 1160, 1163.) We recognize, from the record, that the trial court and defense counsel were frustrated by the delays that prevented this cause from moving along in a reasonable manner, but we must not allow personal frustration alone to be a cause for dismissal. Our review of the record leads us to the conclusion that the dismissal of plaintiff's action was disproportionate to the circumstances, inappropriate under Rule 219(c)(v), and, therefore, an abuse of discretion by the trial court.

Reversed and remanded.

MAAG, P.J., and CHAPMAN, J., concur.

APPENDIX E

MAPS AND TABLES

(1) State of Illinois Judicial Districts
(2) County Map of Anna, Illinois
(3) Genealogical Table

JUDICIAL DISTRICTS OF ILLINOIS APPELLATE COURT

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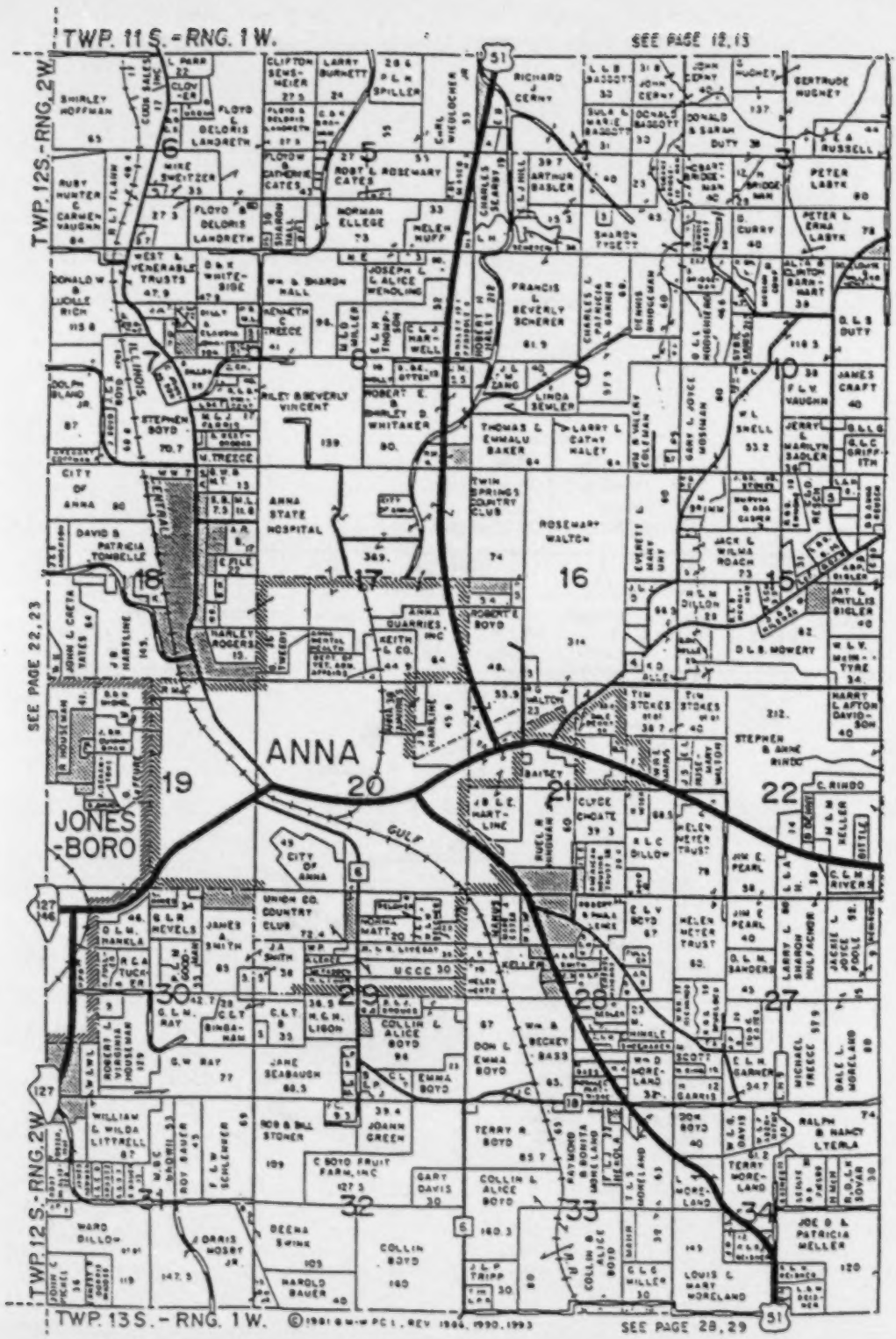
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SEE PAGE 12, 13
TWP. 12 S. - RNG. 2 W.
SEE PAGE 22, 23
ANNA
JONES -BORO
GULF
TWP. 13 S. - RNG. 1 W.
SEE PAGE 28, 29

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Walton family kinship